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13
14 UNITED STATES BANKRUPTCY COURT

15 DISTRICT OF OREGON

16 In re

17 B. & J. Property Investments, Inc.

18 Debtor.

Case No. 19-60138-pcm11

LEAD CASE

Jointly Administered With

Case No. 19-60230-pcm11

19
20 In re

21 William J. Berman,

22 Debtor.

MOTION TO DESIGNATE BALLOT

23
24 **I. INTRODUCTION**

25 On December 4, 2019, B. & J. Property Investments, Inc.'s counsel received a ballot
26 purporting to reject the Plan from a creditor listed as "All class action claimants (Marion

County Case #13C14321) who did not file a separate ballot” (the “Ballot”). The Ballot was signed by “Brady Metz, Attorney for Class Representatives in Case 13C4321.” Pursuant to Sections 105(a)¹ and 1126(e)² of the Bankruptcy Code, the Ballot must be disqualified.

II. THE COURT SHOULD DESIGNATE THE PURPORTED CLASS ACTION CLAIMANTS’ BALLOT REJECTING THE PLAN

A. No Class of Creditors has been Certified to Vote on Debtors’ Plan

When a class is certified in a state court action, it is certified for purposes of that action only. ORCP 32. Class certification in state court does not create a class in federal court. *Id.*

In these bankruptcy cases, no class of creditors has been certified as a “class.” Simply put, this self-described creditor group does not exist as a class in the bankruptcy case. It does not hold a class claim against Debtors and does not have a right to payment from Debtors. In turn, the Ballot does not constitute a valid class ballot.

The fact that a class was previously certified in the state court class action case is irrelevant for present purposes. The members and representatives of the previously certified class action case have no standing or right to collectively vote on the Plan in this bankruptcy case. Significantly, a class created to pursue a non-bankruptcy action (here, the Marion County class action case) does not remain a class for purposes of a subsequent bankruptcy case. *In re Ross*, 37 B.R. 656 (9th Cir. BAP 1984) (the creation of a class relates solely to a single common litigation event; all actions taken on behalf of the class must relate to that litigation and upon the conclusion thereof, the class ceases to exist). Because the purported

¹ “The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to ... prevent an abuse of process.” 11 U.S.C. § 105(a).

² On request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not ... in accordance with the provisions of this title. 11 U.S.C. § 1126(e).

1 creditor class does not exist and no such group of creditors has been certified as a class in this
2 Bankruptcy Case or authorized to vote on the Plan, the Ballot should be disregarded.

3 **B. NO COUNSEL HAS BEEN AUTHORIZED TO VOTE ON BEHALF OF**
4 **A CLASS IN THE BANKRUPTCY CASE**

5 As set forth above, the purported creditor class does not exist and no class was ever
6 authorized to collectively vote on the Plan. Likewise, no counsel was ever authorized to act
7 on behalf of this non-existent class. There is no evidence that the purported class members
8 included in the Ballot ever authorized Brady Metz to file the Ballot on their behalf. While
9 Section 1126 permits a creditor to vote for or against a plan, it does not allow an agent
10 (including a lawyer) to file a ballot on behalf of the creditor(s) and then inform the creditor(s)
11 of the ballot after the fact. *Reid v. White Motor Corp.*, 886 F.2d 1462 (6th Cir. 1989) (“It is
12 well-settled that consent to being a member or the representative of a class in one piece of
13 litigation is not tantamount to a blanket consent to any litigation the class counsel may wish
14 to pursue.”) That, however, is what appears to have occurred here. For this reason as well,
15 the Ballot was not authorized as must be disregarded.

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In addition, I served the foregoing on the parties indicated as “Non-ECF” on the attached List of Interested Parties by mailing copies thereof in sealed, first-class postage prepaid envelopes, addressed to the parties’ last-known address and depositing in the U.S. mail at Portland, Oregon on the date set forth below.

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Ava L. Schoen, OSB No. 044072
Attorneys for Debtor B. & J. Property
Investments, Inc.

038533/00002/10609179v1

LIST OF INTERESTED PARTIES

In re B. & J. Property Investments, Inc.
U.S. Bankruptcy Court Case No. 19-60138-pcm11

ECF PARTICIPANTS

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KEITH D KARNES on behalf of Creditor Committee Ad Hoc Group of Class Plaintiffs
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US Trustee, Eugene
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NON-ECF PARTICIPANTS

TOP 20 UNSECURED CREDITORS

Class Action Plaintiffs
c/o Brady Mertz
Brady Mertz PC
345 Lincoln St.
Salem, OR 97302

Portland General Electric
POB 4438
Portland, OR 97208

Judson's Plumbing
POB12669
Salem, OR 97330

City of Salem
555 Liberty St. SE, Room 230
Salem, OR 97301

Comcast Business
POB 34744
Seattle, WA 98124-1744

Pacific Source
POB 7068
Springfield, OR 97475-0068

Pacific Sanitation
POB 17669
Salem, OR 97305

US Bank
POB 6352
Fargo, ND 58125-6352

Miller Paint
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Salem, OR 97301

HotSuff Spas & Pool
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Chateau Locks
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Salem, OR 97301

Statesman Journal
340 Vista Ave. SE
Salem, OR 97302

Pacific Screening
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DEX Media
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AllAmerican Insurance
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US Bank
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